MOHAMED ISA v. HAJI IBRAHIM

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Ong Hock Thye F.J.) November 21, 1967]

[Penang — Federal Court Civil Appeal No. 8 of 1967]

Land Laws — Fraud — Claim for rectification — Jual janji — Land Enactment (Kedah No. 56) s. 43.

The respondent in this case was the owner of a piece of land. In 1956 he transferred the land to one Mohamed Zain in a *jual janji* agreement under which the land was transferred to Mohamed Zain subject to a right of repurchase by the respondent. Whilst this agreement was in force Mohamed Zain transferred the land also under a *jual janji* agreement to the appellant. The respondent brought this action for an order that the transfer of the land to the appellant be declared void and that the land be transferred to him on payment by him and the sum due under the *jual janji* agreement. The learned trial judge held that Mohamed Zain had fraudulently transferred the land to the appellant and that the appellant was aware of the existence of the *jual janji* agreement between Mohamed Zain and the respondent, and therefore the transfer by Mohamed Zain to the appellant was void. On appeal:—

Held: there was no doubt in this case that a fraud had been committed against the respondent and the appellant knew of this fraud and therefore the appellant's title could not prevail against the claim of the respondent under section 43 of the Land Enactment.

Cases referred to:—

(1) *Haji Abdul Rahman* v. *Mahomed Hassan* [1917] A.C. 209; 1 F.M.S.L.R. 290.

(2) *Yaacob* v. *Hamisah* [1950] M.L.J. 255.

(3) *Wong See Leng* v. *Saraswathy Ammal* [1954] M.L.J. 141.

(4) *Nederlandsche Handel-Maatschappij N.V. (Netherland Trading Society)* v. *Koh Kim Guan* [1959] M.L.J. 173.

(5) *Tan Chye Chew & Anor.* v. *Eastern Mining & Metals Co. Ltd.* [1965] 1 M.L.J. 201.

(6) *Re Monolithic Building Co.* [1915] 1 Ch. 662, 667.

(7) *Assets Co. Ltd.* v. *Mere Roihi* [1905] A.C. 210.

FEDERAL COURT.

A. Jayadeva for the appellant.

Respondent in person.

Cur. Adv. Vult.

Barakbah L.P.: This is an appeal by the second defendant from the judgment of Mr. Justice Yong of the Kedah High Court who made an order in favour of the plaintiff declaring:—

(a) that the transfer (Presentation No: 647/78) of the land held under S.P.K. No: 5538, Portion No: 1308, in the Mukim of Sala Besar, from the first defendant to the second defendant was null and void;

(b) (i) that the proper registering authority should forthwith cancel and expunge from his records and from the issue document of title S.P.K. No: 5538 the said transfer;

(ii) that the second defendant should forthwith deliver to the proper registering authority at Yen Land Office the said issue document of title S.P.K. No: 5538;

(iii) that the first defendant should transfer and execute all necessary instruments transferring the said land to the plaintiff immediately on the plaintiff depositing in court the sum of $900;

(iv) that the second defendant should be at liberty to claim the sum of $900 deposited in court and to sue the first defendant for the balance, if any, that may be due to him by the first defendant;

(v) that the first and second defendants should pay to the plaintiff the costs of the suit to be taxed by the proper officer of the court.

The facts of the case, briefly, are that on 23rd July, 1956, the first defendant who was the respondent's neighbour agreed to lend the plaintiff $900 and the respondent agreed to transfer the said land to him with the stipulation that the plaintiff should have the right to redeem or buy back the said land from the first defendant at the same price within the period of six years. At the Land Office the registering authorities wanted the true value of the land, that is $2,000, to be stated on the memorandum of transfer. In order to get over this difficulty the respondent transferred the said land to the first defendant at the price of $2,000 for which the first defendant paid the respondent $900 in cash. On the same date a *"jual janji"* agreement was executed whereby the first defendant agreed to allow the respondent to redeem or repurchase it from him at the same price of $2,000 within the period of six years (Exhibit P.1.). There was also a promissory note acknowledging a debt of $1,100 to the respondent by the first defendant (Exhibit P.2). It was agreed that on the repurchase of the said land by the respondent from the first defendant the respondent should only pay the sum of $900 and that Exhibit P.2 would be returned to the first defendant.

Before the expiration of the said period, on 14th March, 1959, (by an agreement, Exhibit D.6), the first defendant fraudulently transferred the said land to the appellant at the price of $4,525 to the effect that the first defendant would buy back the land from the appellant within the period of three years. If after the completion of the period of three years the first defendant did not buy back the land then the appellant would agree to discuss the matter in order to renew the agreement. On 2nd April, 1962, a second agreement (Exhibit P.3) was executed by the first defendant giving the respondent the right to repurchase the said land within a further period of five years expiring on 2nd April, 1967. A new promissory note (Exhibit P.4) was also made renewing the promissory note Exhibit P.2. Before the expiration of the first agreement between the respondent and the first defendant the respondent had approached the first defendant on several occasions for the purpose of repurchasing the said land but the first defendant kept putting him off and offered instead to extend the agreement (Exhibit P.1) for the further period of five years. Hence Exhibit P.3.

There was no dispute about the execution of the agreement Exhibits P.1, P.2, P.3, P.4 and D.6. It has been held that a *"jual janji"* agreement confers on the debtor no real right to the land but a mere contractual right (see the cases of *Haji Abdul Rahman* v. *Mahomed Hassan,*[1] *Yaacob* v. *Hamisah* [2] and *Wong See Leng* v. *Saraswathy Ammal* [3]).

The respondent alleged that there was fraud on the part of the first defendant when he transferred the said land to the appellant and that at the time the appellant purchased it he well knew that the *"jual janji"* agreement between the respondent and the first defendant was in existence. This allegation was not disputed by the first defendant as neither did he file a written statement of defence nor did he appear in court at the hearing of the case.

The appellant admitted that he bought the said land from the first defendant and that P.W.4 was a witness to the agreement regarding the purchase of the said land by him from the respondent (Exhibit D.6) but he denied that P.W.4 had informed him that there was a *"jual janji"* agreement between the first defendant and the respondent regarding the said land.

The learned trial judge found as a fact that the appellant was not a *bona fide* purchaser under section 43(4) of the Kedah Land Enactment which reads as follows:—

"Nothing in sub-section (2) or (3) shall affect the title of a proprietor, chargee or lessee who has taken *bona fide* for valuable consideration from any proprietor, chargee or lessee whose registration as such was procured by any such means or by means of such instrument as aforesaid or of any person claiming *bona fide* through or under him."

Therefore he had no better title to the land than the transferor. He relied on the evidence of P.W.4 who was a witness to Exhibit D.6, bearing in mind that in civil cases a high standard of proof is required in cases where fraud is alleged — *Nederlandsche Handel-Maatschappij N.V.* (*Netherlands Trading Society*) v. *Koh Kim Guan* [4] and *Tan Chye Chew & Anor.* v. *Eastern Mining and Metals Co. Ltd.*[5] There was also evidence that although the appellant bought the said land in 1959 he did not enter into possession of the *"bendang"* part of the land until 1964 and he never occupied the kampong land at all. The kampong land was in the possession of the respondent who had five houses on it occupied by him and his children. The respondent had made repeated demands for the repurchase of the said land before the expiration of the stipulated period but of no avail. From the facts adduced at the trial, in my opinion, the learned trial judge had arrived at the right conclusion and in the circumstances I see no reason why I should disturb his judgment in favour of the respondent.

The appeal is therefore dismissed with costs.

Azmi C.J. (Malaya): This is an appeal against the judgment of the High Court at Alor Star declaring that the transfer of land registered as presentation No. 647/78 on a title S.P.K. 5538 be declared void and that the land be transferred back to the respondent on the payment by him into court a sum of $900.

The respondent was the plaintiff in the suit before the High Court against two defendants. Mohamed Zain was the first defendant and the present appellant was the second defendant.

In 1956 the plaintiff transferred the land to the first defendant for $2,000 and at the same time both signed agreement Exh. P.1 and the first defendant also signed Exh. P.2 in favour of the plaintiff. In Exh. P.1 the first defendant agreed that he would sell back the land to the plaintiff if plaintiff offered to buy back within six years for the sum of $2,000. Two days later, he signed Exh. P.2. This is a promissory note signed by the first defendant in favour of the plaintiff.

Oral evidence was given to explain the necessity of signing Exh. P.2. Accordng to plaintiff only $900 were paid to him, but because the Registrar of Titles insisted that the value of the land for the purpose of stamp duty must be $2,000 it was so written in the document of transfer as the price of the land. That was why they thought it be necessary that the difference of $1,100 should be regarded as a loan by the first defendant to the plaintiff. I must interject to explain that all these documents were done by laymen.

The transaction comprised in the transfer of the land and Exh. P.1 completed between the plaintiff and the first defendant is what is generally known among the Malays in Kedah as a *"jual janji"* or conditional transfer with a right to repurchase and so made in order to enable the lender to benefit from the transaction lawfully according to Muslim law. The rent of the land would then belong to the lender.

On 2nd April 1962, the plaintiff and the first defendant executed a further agreement, that is, Exh. P.3, under which the right to repurchase was extended for a further 5 years. Another promissory note similar in tenor to the first one was also executed by the first defendant.

In the meantime on the 14th March 1959, whilst the first agreement P.1 was still in force, the first defendant transferred the said land to the second defendant at the price of $4,525, and the transfer was registered at the Land Office. They also executed a *"jual janji"* agreement giving the right to the first defendant to repurchase the land within the period of 3 years from the date of the agreement. This agreement is Exh. D.6.

The signing of this agreement was witnessed by Hassan bin Zain, the son of the first defendant.

Hassan bin Zain gave evidence at the trial as a witness for the plaintiff. He said he was aware of the agreement P.1 made between his father and the plaintiff and that he also knew that at that time when he witnessed the agreement D.6 between his father and the second defendant the period for repurchase by the plaintiff from his father had not yet expired. He also stated that he informed the second defendant of this fact just before Exh. D.6 was executed.

The first defendant did not appear at the trial.

The second defendant denied any knowledge of the agreement P.1, but the learned judge for reason he stated disbelieved this.

The learned judge then held that the first defendant had fraudulently transferred the land to the second defendant and that the second defendant was well aware of the existence of the "*jual janji*" agreement between the first defendant and the plaintiff and that it was still in subsistence. He therefore found that fraud had been proved against both defendants and therefore held that that transfer by the first defendant to the second defendant was void.

There were several grounds of appeal against the judgment of the learned judge but I consider that except for grounds 5 and 8, they have no substance.

Grounds 5 and 8 read as follows:—

"5. The plaintiff by his statement of claim in paragraph 7 alleges that the first defendant defrauded the plaintiff on the 14th day of March 1959 by transferring the land to the second defendant. The particulars of fraud relied on by the plaintiff were that the second defendant was aware of the transaction between the plaintiff and the first defendant and that the second defendant was told that the plaintiff had sold the land to the first defendant under the terms of a *jual janji*. The statement of claim therefore discloses no cause of action against the second defendant as there is no allegation in the statement that the second defendant had also defrauded the plaintiff. The learned trial judge failed to direct himself on this issue.

8. The learned trial judge erred in law in holding that the fact that the second defendant knew of the existence of the *jual janji* agreement (P-1) made between the plaintiff and the first defendant and the fact that the second defendant knew that the first defendant was defrauding the plaintiff amounted in law to fraud. The English principles of notice does not apply to the provisions of registration of title under the land code. It is not fraud to stand on or take advantage of legal rights, the existence of which may be taken to be known to both parties".

In my view both grounds should be considered together. The particulars of fraud given in the statement of claim read as follows:—

(i) The 2nd defendant was aware of the whole transaction between the plaintiff and the 1st defendant as it was common knowledge in the locality where the plaintiff, the 1st and 2nd defendants live.

(ii) The 2nd defendant was in fact told that the plaintiff had sold the said land to the 1st defendant under the terms of a *jual janji* by one of the witnesses to the Memorandum of Transfer made the 14th day of March, 1959.

The gist of the argument before us was whether the knowledge of the second defendant of the existence of the "*jual janji*" between the first defendant and the plaintiff and that it was still in force amounts to actual fraud. According to appellant "it was not fraud to stand on or take advantage of legal rights the existence of which may be taken to be known to both parties." I understand this passage was taken from *S. K. Das* on "The Torrens System in Malaya" at page 169. As a matter of fact that passage was lifted from the judgment of Lord Cozens-Hardy M.R. in *Re Monolithic Building Co.*[6] The headnote in that case reads as follows:—

"Section 93 of the Companies (Consolidation) Act, 1908, avoids an unregistered mortgage as against a subsequent registered incumbrancer even though he had express notice of the prior mortgage at the time when he took his own security."

Now at page 662 the Master of the Rolls said this:—

"It is said that we ought to read section 93, (Companies Consolidation Act) contrary, as it seems to me, to its construction and intent, as saying an unregistered mortgage shall be void against any creditor of the company except where he has had notice if its existence. I ask why? Notice is not material in the case of a creditor. I feel the greatest possible difficulty in saying that that doctrine can apply. I put aside altogether any question of fraud. The doctrine of the court in a case of fraud, of course, proceeds upon a different footing, and any security may be postponed if you can find fraud on its inception. But it is not fraud to take advantage of legal rights the existence of which may be taken to be known to both parties."

It is obvious that the passage relied upon by the appellant is obiter. This is confirmed by the judgment of Phillimore L.J. in the same case as follows at page 667:—

"No case of fraud was made against the defendant Jenkins, and we need not consider, and cannot consider, whether or not the plaintiff has any remedy against him for negligence or misconduct in his independent office of director of this company. We have to construe section 93 of the statute. . . ."

Section 43 of the Kedah Enactment No. 56 (Land) reads as follows:—

"43. (1) The title of a proprietor, chargee or lessee shall be indefeasible except as in this section provided.

(2) In the case of fraud or misrepresentation to which he is proved to be a party the title of such proprietor, chargee or lessee shall not be indefeasible."

The learned trial judge had made the following findings of fact with which I with respect agree:—

(a) At the time when the second defendant purchased the said land from the first defendant, the second defendant knew of the existence of the "*jual janji*" agreement P.1 made between the plaintiff and the first defendant.

(b) At the time when the first defendant had fraudently transferred the said land to the second defendant, the latter knew that the first defendant was defrauding the plaintiff.

Fraud under sub-section (2) of section 43 of the Kedah Land Enactment, must mean actual fraud as described in the judgment of the Privy Council in *Assets Co. Ltd.* v. *Mere Roihi* [7] at page 210 which reads as follows:—

"by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud — an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part."

There is no doubt on the facts of the case that the first defendant committed fraud against the plaintiff in transferring the land to the second defendant and I have no hesitation in accepting the finding of the facts by the learned judge that the second defendant knew of the existence of the agreement P.1, and therefore that he knew that the first defendant in transferring the land to him as he did, that the first defendant was defrauding the plaintiff. As the Privy Council has stated in the *Assets* case "Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents." Therefore in this case since it has been proved beyond reasonable doubt that the second defendant knew that the first defendant in transferring the land to him had defrauded the plaintiff, the case for fraud had been sufficiently made against the second defendant.

I would therefore dismiss the appeal with costs.

Ong Hock Thye F.J.: I have had the advantage of reading the judgments of the Lord President and Chief Justice and agree that the appeal be dismissed with costs.

It is sufficient to add that, in my view, there was ample evidence to justify the learned trial judge's finding of fraud. The appellant clearly was an active participant in the fraud of Mohamed Zain and was no less guilty of fraud than the other. But for his participation the fraud could not have been committed. His title, therefore, cannot prevail against the claim of the respondent, by virtue of the provisions of section 43 of the Kedah Land Enactment.

Appeal dismissed.

Solicitors: *Jayadeva, Zahir & Ismi.*

UNITED ENGINEERS (MALAYSIA) LTD. v. LAI PING YOON

[O.C.J. (Gill J.) November 21, 1967]
[K.L. — Civil Suit No. 1003 of 1965]

Hire-purchase — Failure to pay instalments — Right of owner to terminate the hiring and to recover arrears of instalments.

In this case the plaintiffs claimed recovery of five hire rental instalments due under a hire-purchase agreement whereby they let a payloader to the defendant. The facts were that the defendant fell into arrears in the payment of his instalments and as the payloader needed repairs, had sent it to the plaintiffs for repairs. The plaintiffs informed the defendant that unless he paid the instalments due they would resume possession and sell the payloader. The defendant did not pay the instalments within the stipulated time and the plaintiffs sold the payloader and brought this action to recover arrears of the instalments.

Held: (1) the defendant being in arrears of instalments the plaintiffs were entitled to terminate the agreement and in the event of the hiring being so terminated to recover the arrears of rent due up to the date of termination;

(2) the defendant was liable to pay the instalments despite the fact that he was deprived of the use of the machine when it was undergoing repairs as the agreement provided that the hirer shall keep the machine in repair.

[Editorial Note: An appeal was lodged to the Federal Court but later withdrawn.]

Cases referred to:—

(1) *Anglo-American Corporation Ltd.* v. *Goodwood Sawmill Co.* [1966] 1 M.L.J. 263.

(2) *Reliance Car Facilities Ltd.* v. *Roding Motors* [1952] Q.B. 844.

(3) *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] 1 K.B. 130.

(4) *Yeoman Credit Ltd.* v. *Apps* [1962] 2 Q.B. 508.

(5) *Charterhouse Credit Co. Ltd.* v. *Tolly* [1963] 2 Q.B. 683.

(6) *Doobay* v. *Mohabeer* [1967] 2 W.L.R. 1395.

(7) *Yeoman Credit Ltd.* v. *Waragowski* [1961] 1 W.L.R. 1124.

(8) *Overstone Ltd.* v. *Shipway* [1962] 1 W.L.R. 117.

(9) *Financings Ltd.* v. *Baldock* [1963] 2 Q.B. 104.

(10) *Lee* v. *Butler* [1893] 2 Q.B. 318.

(11) *Helby* v. *Matthews* [1895] A.C. 471.

(12) *Bridge* v. *Campbell Discount Co. Ltd.* [1962] 1 All E.R. 385.

(13) *Re Robertson, Ex parte Crawcour* (1878), 9 Ch. D. 419.

(14) *McEntire* v. *Cross-Brothers Ltd.* [1895] A.C. 457.

(15) *Transport & General Credit Corpn. Ltd.* v. *Morgan* [1939] 2 All E.R. 17 at p. 28.

(16) *Stockloser* v. *Johnson* [1954] 1 Q.B. 476.

(17) *Kelly* v. *Lombard Banking Co. Ltd.* [1959] 1 W.L.R. 41.

(18) *Brooks* v. *Beirnstein* [1909] 1 K.B. 98.

CIVIL SUIT.

S. B. Menon (Mrs.) for the plaintiffs.

A. Y. L. Lee for the defendant.